APPEAL NO. 042379
FILED NOVEMBER 12, 2004

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 18, 2003. The hearing officer determined that the _____, compensable injury of appellant (claimant) includes spinal stenosis and degenerative disc disease and that claimant's impairment rating (IR) is 20%. Claimant appealed these determinations on sufficiency grounds, and also contends that the designated doctor did not correctly apply the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order. The Appeals Panel affirmed the determination regarding extent of injury but reversed the IR determination. Texas Workers' Compensation Commission Appeal No. 040723, decided May 24, 2003. The Appeals Panel noted that IR assessments made after statutory maximum medical improvement (MMI) should be based on the injured employee's condition as of the date of statutory MMI. The Appeals Panel said that, because the designated doctor did not assess the 20% IR based on claimant's condition as of the date of statutory MMI, the hearing officer erred in according presumptive weight to the designated doctor's third report. The Appeals Panel remanded with instruction to seek clarification from the designated doctor regarding claimant's IR at the time of MMI. The hearing officer sought clarification from the designated doctor, who reexamined claimant and certified that the IR is 10% based on the condition at the time of statutory MMI. Claimant appealed this determination, contending that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) should not be applied retroactively. The file does not contain a response from respondent (carrier).

DECISION

We affirm.

Section 408.125(c) provides that the designated doctor's IR report has presumptive weight and that the Texas Workers' Compensation Commission (Commission) shall base its determination of IR on that report unless the great weight of the other medical evidence is to the contrary. The Commission has recognized that this version of Rule 130.1(c)(3) being applied did not become effective until March 14, 2004. However, we have applied it retroactively, citing Section 408.123(a) and Texas Workers' Compensation Commission, *et al*. v. Garcia, 893 S.W.2d 504 (Tex. 1995). *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004. We conclude that the hearing officer's determination that the IR is 10%, as reported by the designated doctor is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. We have reviewed the contentions in claimant's brief and conclude that no reversible error has been shown.

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **TEXAS BUILDERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

BETTYE ANN ROGERS WESLEY
11612 RM 2244 (BEE CAVES ROAD), BUILDING 1, SUITE 200
AUSTIN, TEXAS 78738.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Edward Vilano
Appeals Judge

DISSENTING OPINION:

I dissent. I realize that I concurred in the decision in Appeal No. 040723, *supra*. However, in light of the claimant's brief in the present appeal, I realize that my concurrence was in error. As I stated in my dissenting opinions, Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004, and Texas Workers' Compensation Commission Appeal No. 042160, decided October 20, 2004, it is my opinion that a hearing officer decision should not be reversed for not applying Rule 130.1(c)(3) before its effective date. As I stated in my dissenting opinion in Appeal No. 040583-s, *supra*, "To remand this case back to the hearing officer for not applying a rule (Rule 130.1(c)(3)), which was not in effect at the time of the hearing, dispenses with any pretense to prospectively, as opposed to retroactively, applying the law." Quite frankly I failed to appreciate at the time that Appeal No. 040723 was issued that the original CCH was held prior to the effective date of Rule 130.1(c)(3). The claimant's brief on remand arguing that we have required the hearing to retroactively apply Rule 130.1(c)(3) has now made me aware of this. In light of this awareness, I believe that this case should have never been remanded, and the original decision of the hearing officer should have been affirmed. This is the same view I expressed in my dissenting opinion in Appeal No. 042160, *supra*.

_____
Gary L. Kilgore
Appeals Judge